FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
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January 29, 2008

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	: : : :	CIVIL PENALTY PROCEEDING Docket No. WEST 2006-451-M A.C. No. 48-00004-087217
v.	:	
RINKER MATERIALS WESTERN, INC., Respondent	: :	Guernsey Quarry
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	: : : :	CIVIL PENALTY PROCEEDING Docket No. WEST 2007-113-M A.C. No. 48-00004-099221A
v.	:	
WILLIAM E. REFFALT, employed by Rinker Materials Western, Inc., Respondent	: : :	Guernsey Quarry

DECISION

Appearances: Kristi Henes, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Petitioner;
Katherine Shand Larkin, Esq., Jackson Kelly, PLLC, Denver Colorado, for Respondents.

Before: Judge Manning

These cases are before me on petitions for assessment of civil penalty filed by the Secretary of Labor, acting through the Mine Safety and Health Administration ("MSHA"), against Rinker Materials Western, Inc., doing business as Guernsey Stone Company ("Rinker") and William E. Reffalt, pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815 and 820 ("Mine Act"). The petitions allege that Respondents violated 30 C.F.R. § 56.9200(d). An evidentiary hearing was held in Cheyenne, Wyoming, and the parties filed post-hearing briefs.

I. BACKGROUND AND SUMMARY OF THE EVIDENCE

Rinker operates the Guernsey Quarry, a quarry that produces crushed limestone, in Platte County, Wyoming. On December 19, 2005, MSHA received a hazard complaint from a miner working at the quarry. As set forth on MSHA's notification form, the complaint was as follows:

> The boss, Bill [Reffalt], told an employee to ride in the front-end loader all day with another employee to task train him. The trainer didn't have a seat belt or seat to sit in while doing the training. A chair was put in the loader to use but it is still unsafe.

(Ex. G-5). MSHA Inspector Thomas A. Markve traveled to the quarry on December 20, 2005, to investigate the hazard complaint. (Tr. 31). At the conclusion of his investigation, Inspector Markve issued Citation No. 7913458 under section 104(d)(1) of the Mine Act alleging a violation of 30 C.F.R. § 56.9200(d). The body of the order provides as follows:

> It was established that employees are being task trained in the 980C and 980H front-end loaders without making provisions for secure travel of the second person in the cab. The unsafe work practice was accomplished in the 980C front-end loaders by having the second person sit on the arm rest. The unsafe work was accomplished in the 980H by providing a folding chair and the second person sat in that while the equipment was operating. Bill [Reffalt], superintendent, engaged in aggravated conduct constituting more than ordinary negligence in that he admitted to knowing about and assigning employees to accomplish task training by the above-mentioned means.

The inspector determined that an illness or injury was reasonably likely, that any accident could be fatal, that the violation was of a significant and substantial nature ("S&S"), and that the violation was the result of the operator's unwarrantable failure to comply with the standard. The cited standard provides that "[p]ersons shall not be transported – (d) outside cabs, equipment operators' stations, and beds of mobile equipment, except when necessary for maintenance, testing, or training purposes, and provisions are made for secure travel." The Secretary proposes a penalty of $2,000.00 against Rinker and a penalty of $750.00 against Mr. Reffalt.

Inspector Markve testified he read the allegations contained in the complaint to Quarry Superintendent William Reffalt. In response, Mr. Reffalt replied "[w]ell, we did it, but I don't know how else I am going to do it. I am not going to turn over a $500,000 loader to an 18-year old kid." (Tr. 33). Markve also spoke to Kevin Kolar, the miners' representative and task trainer, regarding the complaint. Kolar had been the task trainer on December 9, 2005, the date of the incident in the complaint. Markve stated that Kolar read the complaint and they discussed the use of the 980H loader with a folding chair. (Tr. 35). Markve said that Kolar volunteered the

information that when he task trains on the 980C the second man sits on the armrest. (Tr. 35; Ex. G-3) During this conference, Markve also asked Reffalt if he was aware of this practice. He replied that he was and that he assigned it. (Tr. 36). Markve also noted in his notes that Reffalt was visibly upset for his job and felt he may be fired. (Tr. 37-38). Markve was able to terminate the citation after Reffalt assured him that they would no longer be training in this manner. (Tr. 38)

Markve testified that the complainant told him that the training occurred in the production cycle and that there was no separate area designated for training. (Tr. 43). The complainant also indicated that there were hazards present in the area, including a large hole next to the fines stockpile where the training was taking place. (Tr. 44).

Special Investigator Markve issued the citation because a second person was being transported outside of the operator's station and was not secured. He determined that high negligence was present and that injury or illness was reasonably likely to result in a fatality due to the violation. (Ex. G-2) He made this determination because there are many starts, stops, and turns in a confined area that could cause an unsecured person to hit the glass. (Tr. 50-51). This citation was designated as an unwarrantable failure because Reffalt told Markve that this is the way Rinker task trains front-end loader operators and the company has been task training in this manner for about 30 years. (Tr. 52-53). Markve also noted that he later spoke with MSHA Inspector Joel Tankersly who told him that about a year earlier Reffalt had asked about having a second person in the loader and that Tankersly told Reffalt that it was prohibited. (Tr. 54).

Markve spoke with other mine operators located in the area regarding their training procedures. (Tr. 57). He was told that the trainee sits at the controls while the trainer goes over what the controls are for. Once the trainee feels comfortable with the controls, the trainer leaves the cab and uses radio contract to instruct the trainee on the various tasks necessary for the training. He was also told that training was not done during production, but rather in a remote area.

According to Markve, the operator's station consists of the manufactured seat that is anchored down with a seat belt. (Tr. 48). In his opinion, secure travel in a front-end loader requires an anchored seat and a seatbelt and that no other methods of secure travel will work in this type of machine. However, he did state that in other pieces of mobile equipment there are often other means of secure travel, such as in a road grader.

Monte Morlock, an employee of FMC Corporation, testified on behalf of the Secretary. Morlock has been with FMC for 32 years and does general maintenance, is the union president, and is on the safety committee. He described the training procedures used at FMC. He stated that the operating manual is discussed including the safety aspects and dangers of the equipment. (Tr. 103). The trainer would then show the trainee the operating levers and how the machine functions. After this is complete, the trainer would take the trainee to a place where there is plenty of room to practice without the potential for endangering anyone or damaging property.

The trainer would decide when the trainee was able to operate the equipment on his own. Additionally, Morlock testified that in his 32 years in the business he has never heard about or observed two people riding in the cab of a front-end loader. (Tr. 106). He also stated that the operator's station is the seat where the steering wheel and controls are located so that the equipment can be operated.

Joel Tankersly, a former MSHA Inspector, also testified on behalf of the Secretary. Tankersly testified that he had been to the Guernsey Quarry many times on inspections and complaints. (Tr. 119). He stated that he had a discussion with Reffalt regarding the appropriate procedures for front-end loaders. He stated that he was asked by Reffalt whether it was allowable to put two people in the cab of a loader for training purposes and that he replied no. (Tr. 120). Tankersly noted the conversation in the inspection justification/comments section of his report by writing that Reffalt had asked questions regarding the Mine Act and safe work procedures. (Tr. 122; Ex. G-13). Tankersly described the operator's station as the seat where the operator sits. (Tr. 123).

Ronald Goldade, MSHA Specialist for the Rocky Mountain District, testified on behalf of the Secretary. Goldade stated that he has never issued a citation for two people riding inside the cab under section 9200(d). (Tr. 145). Goldade testified that based on his years of experience and through his knowledge of generally accepted industry standards, the operator's station consists of the area where the operator sits with access to the controls that operate the equipment. (Tr. 151). He also stated that the operator's station and the cab are not the same thing as the cab is the structure that surrounds the operator's station. (Tr. 152). Additionally, he stated that secure travel consists of the manufactured seat and seatbelt. Goldade spoke to several people in the industry to ascertain their training technique for front-end loaders and found that nobody had two people in the cab during the training. (Tr. 163).

William Reffalt, the mine superintendent, testified on behalf of the company. Reffalt described the training process for front-end loaders that the company uses. He stated that in the 980H, a folding chair was put in the cab for the trainee to sit on. The training took place in the fines area that was big and flat and about 400 feet wide and 7,800 feet long. (Tr. 220-21). There were 6 ½ to 7 foot berms surrounding the area. Reffalt stated that he was at the quarry on the day of the alleged training violation, that he was aware the training was going on, and that he approved the training being conducted in this manner. (Tr. 221). He also explained that the folding chair fit neatly between the door and the armrest. According to Reffalt, he and Tankersly never had a conversation regarding having two people inside the cab of the loader, but rather discussed an incident involving a driller who was hanging out a half open door in the loader. (Tr. 228). He also described the training used on the 980C loader. There was not enough room for a chair in this model, so one of the men sits on the armrest while instruction takes place.

Reffalt remarked that he was very concerned at the time for his job due to the unwarrantable failure designation in the citation. He also felt that the company was conducting the training in what it believed was the safest way possible. (Tr. 231). Reffalt felt this way

because many of the trainees have never even see a loader and a lot of the training process requires the trainer to actually be able to see the expressions on the trainee's face. The trainer can see what is going on with the trainee and can put the machine into neutral and stop it if necessary. Reffalt also stated that in his opinion the cab and the operator's station were the same thing. (Tr. 234). Reffalt also noted that this practice has been going on for his entire 31 years at the quarry and MSHA has never cited this condition. (Tr. 235).

Kevin Kolar, equipment operator and trainer, also testified on behalf of the company. Kolar operates the 980C and 980H front-end loaders at the Guernsey Quarry. Kolar was trained on the 980C in the same manner when he came to work for the company. (Tr. 278). Kolar had three years experience before he began working at Guernsey Quarry. He stated that he trained in the fines area and he was in the cab by himself. He later rode in the cab with the trainer to learn how to load the train at the train yards. Kolar stated that he was on the armrest while his trainer drove and was instructing him.

Kolar was the trainer involved in the incident that led to the alleged violation. He testified that he took the trainee to the fines area to conduct the task training on the 980H. He stated that he got the folding chair and put it in position. Kolar drove and the trainee was in the folding chair. Kolar said that there was sufficient room inside the cab to accommodate the chair. (Tr. 286). After 30 minutes of training with Kolar driving, the two switched places to allow the trainee to try to operate the loader. Kolar estimated he spent four hours training. Kolar does not agree that the training should be conducted through the use of radio communication. (Tr. 302). He does not feel this is a safe way as the trainee already has his hands full learning how to use the controls of the loader so trying to use the radio at the same time would be unsafe.

Vernon Gomez, a mine consultant, testified on behalf of the operator. Gomez is a former MSHA administrator for the metal/nonmetal division, the highest ranking non-political position in that division. Gomez stated that he was very familiar with the regulatory history of the standard in question. At the time this regulation was being proposed, Gomez was a district manager and stated that members of the committee would call district managers on occasion to ask about regulations that were being considered. (Tr. 318). Based on his knowledge of the regulation and its history, Gomez did not feel that a violation had occurred. He stated that the operator is the person who has the seat and seatbelt and that there was nothing in the regulation requiring anyone else to have a seatbelt. He also stated that the word "accommodate" used in the regulation replaced the word "overcrowded" and that accommodate means that there is room for a person to be in the cab. (Tr. 321).

Gomez also testified that he never cited anyone for a violation of the standard for this type of practice and said that if he knew operators were being cited for this he would have stopped it. (Tr. 322). Gomez said that in his time as an inspector, he actually rode in equipment, including front-end loaders. He also went to the Guernsey Quarry prior to the hearing to test out the company's new MSHA-mandated training procedures. He stated that he stood 10, 15, and 35 feet away from the loader and all he could see was the steering wheel.

II. DISCUSSION WITH FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Summary of the Parties' Arguments Regarding Rinker's Liability.

The Secretary argues that it is beyond dispute that the 980H and 980C loaders were not designed to accommodate more than one person, the equipment operator. Haul trucks and other vehicles often include two seats equipped with seat belts in the cab. She contends that the testimony presented at the hearing supports her interpretation of the safety standard. The term "equipment operators' station" used in the standard is not synonymous with the term "cab." The equipment operator's station consists of the seat used by the equipment operator because he has access to all of the loader's controls from the seat. This space is designed by the manufacturer for use by the equipment operator. The cab is what surrounds the equipment operator's station. If the drafters of the standard had wanted to ensure that no miners are transported outside cabs, the reference to the equipment operator's station would have been unnecessary. The Secretary also argues that, to the extent that the standard is not clear on its face, her interpretation is entitled to deference. The record makes clear that mine operators understand what the standard requires because other operators in Wyoming do not task train employees to operate loaders by having the trainer sit on the armrest or on folding chairs inside the cab.

Rinker argues that the language of the safety standard is clear and unambiguous. The ordinary meaning of the words "cabs" and "operators' stations" with respect to a front-end loader are the same. Any "ordinary person would understand that the cab of a front-end loader is the equivalent of the operator's station." (G. Br. 5). The operator's station takes up the entire space within the cab and it is undisputed that nobody was being transported outside the cab. The Caterpillar Operational and Maintenance Manual clearly equates the cab of the front-end loader with the operator's station. (Exs. G-9 and R-2).

B. Analysis of the issues.

The language of the safety standard can be broken down as follows:

> Persons shall not be transported outside:
> (1) cabs,
> (2) equipment operators' stations, and
> (3) beds of mobile equipment,
> except when necessary for
> (1) maintenance,
> (2) testing, or
> (3) training purposes,
> and provisions are made for secure travel.

The first issue is whether the language of the safety standard is clear on its face. "In statutory interpretation, the ordinary meaning of the words must prevail where that meaning does not thwart the purpose of the statute or lead to an absurd result." *Emery Mining Corp.*, 9 FMSHRC 1997, 2001 (December 1987) (citation omitted). This same principle applies to the interpretation of the Secretary's safety standards. Where the language of a standard is clear, the terms of that standard must be enforced as written unless MSHA clearly intended the words to have a different meaning or unless such a meaning would lead to absurd results. *Eastern Associated Coal Corp.*, 27 FMSHRC 238, 242 (March 2005).

I find that the language of the Secretary's safety standard is not clear on its face. As relevant here, the standard states that miners are not permitted to ride outside of cabs or outside of equipment operators' stations unless they are performing one of the listed functions. The term "equipment operators' stations" is not defined by the Secretary. There is nothing in the language of the standard that would logically lead to the conclusion that the Secretary intended "cabs" and "equipment operators' stations" to be interpreted synonymously. Without getting too ensnared into the question of what exactly is an "equipment operators' station," one can think of examples where such a station is not the same as the cab. In a cherry picker, for example, the boom can be controlled from the cab of the truck and from the basket at the end of the boom. Clearly, the basket fits within the concept of an equipment operator's station but it is not within a cab. The difficulty comes when the equipment operator's station is within a cab. Rinker contends that when an equipment operator's station is within a cab that is designed with only one seat, the cab and operator's station become one and the same. The problem with that interpretation is that it allows others to ride inside the cab without being secured. I note, however, that no MSHA standard specifically requires that all passengers in mobile equipment be seated or secured with a seat belt.

Under the Secretary's interpretation of the standard, on the other hand, it would appear that a violation would be established if anyone other than the equipment operator were to ride inside the cab of mobile equipment unless the other person were present for purposes of maintenance, testing, or training. For example, if the operator of a pickup truck were transporting a miner in the passenger seat to another area of the mine, the transported miner would be outside of the equipment operator's station, as that term is interpreted by the Secretary, and his presence would be prohibited under the standard unless his presence was necessary for maintenance, testing or training even if he were wearing a seat belt. Thus, the language of the safety standard, as interpreted by the Secretary in this case, would appear to prohibit operators from using trucks or other mobile equipment to transport employees within the mine, if the miners were in secured seating, because they would be outside the equipment operator's station.

I find that this safety standard is ambiguous, confusing, and very poorly drafted. When faced with an ambiguous safety standard, the Commission grants deference to the Secretary's reasonable interpretation of the standard. *Eastern Associated Coal Corp.*, 27 FMSHRC at 242. The Secretary's interpretation must be accepted as long as it is not plainly erroneous or inconsistent with the language or purpose of the regulation. *Energy West Mining Co. v.*

FMSHRC, 40 F.3d 457, 460-61 (D.C. Cir. 1994). A statute or regulation that is intended to protect the health and safety of individuals must be interpreted in a broad manner to actually achieve that goal. *Sec. of Labor v. Cannelton Industries, Inc.*, 867 F.2d 1432, 1435 (D.C. Cir. 1989).

A look at the regulatory history provides some clarification. The term "equipment operators' stations" was added when the standard was modified in 1988.[1] The Secretary added that term in her proposed rule. Some of the comments to the proposed rule from mine operators were concerned that the "proposed rule's use of the term 'equipment operators' stations' could prohibit the transportation of persons in cabs that are designed to accommodate more than just the operator of the equipment." (Ex. G-4; 53 Fed. Reg. 32499 (August 25, 1988)). At this point, the Secretary should have modified the language of the proposed rule to make it clear. Instead, the Secretary simply stated in the preamble to the final rule that "MSHA did not intend to restrict the use of such cabs and the final rule includes the term 'cabs' to remove any ambiguity." *Id.* Thus, although this preamble statement is quite clumsy, when the safety standard is read in conjunction with the preamble to the final rule, the requirements of the safety standard are reasonably clear. A mine operator may use mobile equipment to transport miners as long as they are inside the cab and are secured, notwithstanding language in the standard. This Federal Register notice also indicates, by implication, that the Secretary intended that pieces of mobile equipment that were not designed to "accommodate" anyone other than the equipment operator are subject to the requirements of the safety standard. Thus, the Secretary requires all passengers to be secured.

I find the Secretary's interpretation of the term "equipment operators' stations" in the safety standard to be reasonable and entitled to deference. It is clear that one of the purposes of this safety standard is to ensure that people being transported in mobile equipment are secured. Typically, that involves sitting in a seat equipped with a seatbelt.[2] The Secretary's interpretation of the standard to require that anyone in the cab of mobile equipment be secured is reasonable because it helps achieve the goal of promoting safety. Riding in a moving vehicle while sitting on an armrest or in a folding chair creates a hazard. For example, the equipment operator could unexpectedly slam on the brakes and cause the miner sitting on the armrest to be thrown into the windshield. An interpretation of the term "equipment operator's station" that distinguishes that term from the term "cab" is reasonable. Thus, the Secretary's interpretation of the term equipment operator's station to mean the area where the operator sits and operates the controls is reasonable. Under this interpretation, a person sitting on the armrest or on a folding chair in the cab of a loader is clearly not sitting in the equipment operator's station. I note, however, that the confusion engendered by this case could have been avoided if the Secretary more clearly set forth

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[1] Prior to 1988, the safety standard at 56.9-40 provided that persons "shall not be transported: (c) outside the cabs and beds of mobile equipment, except trains."

[2] Section 56.14130(g) requires all equipment operators, except grader operators, to wear seatbelts.

her intentions in the safety standard. In conclusion, although the safety standard is confusing and the preamble to the final rule is rather awkwardly written, I defer to the Secretary's interpretation of the standard because it is consistent with the language and purpose of the regulation.

Rinker also argues that the Secretary did not provide the mining community with fair notice of the requirements of the standard, especially her interpretation of the term "equipment operators' stations." It argues that the Secretary has never provided notice that everyone riding in mobile equipment must be seated and that they must wear seatbelts. It also contends that the preamble language in the Federal Register clarifies nothing because the comment concerning "cabs that are designed to *accommodate* more than just the operator of the equipment" is itself ambiguous. (R. Br. at 10; Ex. G-4 emphasis added). Rinker argues that the Secretary incorrectly interprets the term "accommodate" to mean "seated with a seatbelt." Such an interpretation is neither reasonable nor clear from the language. The cab of the loader could easily "accommodate" the trainer even though he was not secured by a seat belt. The dictionary definition of "accommodate" is "to make room for." (R. Br. at 10). Former Metal/Nonmetal Administrator Gomez testified that the word "accommodate" means "there is room for somebody to get in there, for a person to be in there." (Tr. 321). Indeed, section 56.9200(f) provides that persons shall not be transported "[t]o and from work areas in over-crowded mobile equipment." The interpretation of accommodate offered by Mr. Gomez is consistent with this language. Because it was reasonable for Rinker to assume that the cabs on the loaders could "accommodate more than just the operator of the equipment," it was also reasonable for it to assume that its method of task training did not violate the cited safety standard. Finally, Rinker argues that MSHA has issued only a few citations alleging similar violations. The present case "reveals an attempt by MSHA to engage in [a] new and completely insupportable enforcement direction beginning several months prior to the date of the contested matter." (R. Br. at 11). Rinker notes that the citations MSHA has issued for having two persons inside the cab of mobile equipment were issued within two months of the instant citation. (R. Br. at 11-12).

The Secretary is required to provide fair notice of the requirements of a broadly written safety standard. The language of section 56.9200 is "broadly adaptable to myriad circumstances." *Kerr-McGee Corp.*, 3 FMSHRC 2496, 2497 (November 1981); *Alabama By-Products Corp.*, 4 FMSHRC 2128, 2130 (December 1992). Such broadly written standards must afford notice of what is required or proscribed. *U.S. Steel Corp.*, 5 FMSHRC 3, 4 (January 1983). In "order to afford adequate notice and pass constitutional muster, a mandatory safety standard cannot be 'so incomplete, vague, indefinite, or uncertain that [persons] of common intelligence must necessarily guess at its meaning and differ as to its application' " *Ideal Cement Co.*, 12 FMSHRC 2409, 2416 (November 1990) (citation omitted). A standard must "give a person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." *Lanham Coal Co.*, 13 FMSHRC 1341, 1343 (September 1991).

> When faced with a challenge that a safety standard failed to provide adequate notice of prohibited or required conduct, the Commission has applied an objective standard, *i.e.*, the reasonably

> prudent person test. The Commission recently summarized this test as "whether a reasonably prudent person familiar with the mining industry and the protective purposes of the standard would have recognized the specific prohibition or requirement of the standard."

Id. (citations omitted). To put it another way, a safety standard cannot be construed to mean what the Secretary intended but did not adequately express. "The Secretary, as enforcer of the Act, has the responsibility to state with ascertainable certainty what is meant by the standard he has promulgated." *Diamond Roofing Co. v. OSHRC*, 528 F.2d 645, 649 (5th Cir. 1976).

I find that adequate notice of the requirements of the standard was provided to mine operators. It is important to recognize that Rinker's method of task training operators of front-end loaders is not typically used by mine operators. Former MSHA Inspector Joel Tankersly, Inspector Markve, and Inspector Goldade had never observed the practice of operators task training with two people inside the cab of a front-end loader. (Tr. 56, 122, 127, 145-46, 174, and 190-91). Goldade testified that he talked to a number of mine operators and none of them trained equipment operators with two people in the cab of a loader. (Tr. 157-63; Ex. G-14). Indeed, Goldade testified that the industry representatives he talked to said that such a practice would be unacceptable under the standard. (Tr. 163). Monte Morlock testified that in his 32 years in the business he has never heard of or seen two people riding in the cab of a front-end loader. (Tr. 106). Thus, the evidence of record indicates that most operators understand the requirements of the standard. It appears that few citations have been written for similar violations because the practice is rare. I find that the notice arguments made by Rinker parse the words of the standard too closely, especially its arguments concerning the use of the word "accommodate" in the preamble. It is not logical to believe that the cab of a loader can "accommodate" a second person because he can sit on the armrest or on a folding chair. I agree that the language of subsection (f) of the standard confuses the issue somewhat, but I hold that fair notice of the requirements of subsection (d) was provided to the mining community. A reasonably prudent person familiar with the mining industry and the protective purposes of the standard would have recognized that Rinker's method of task training loader operators was prohibited by the standard.

It is undisputed that two people were inside the cab of front-end loaders when miners were being task trained on the equipment. The 980H and 980C loaders were not designed to seat more than one person inside the cab. The person who was seated on the armrest or in a folding chair was outside the equipment operator's station. As a consequence, Rinker violated the standard unless the situation presented is covered by one of the exceptions provided in the standard.

The relevant exception within the standard provides that a miner may be outside the equipment operator's station when necessary for training, but only if provision is made for secure travel. In this case, the miner who was outside the operator's station was not secure. As stated above, in the event of an accident, he could have been thrown about in the cab because he was

not wearing any type of restraining device such as a seat belt. On this basis, I find that the Secretary established a violation.

C. Significant and Substantial

A violation is classified as S&S "if based upon the facts surrounding the violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." *National Gypsum Co.*, 3 FMSHRC 822, 825 (April 1981). In *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (January 1984), the Commission set out a four-part test for analyzing S&S issues. Evaluation of the criteria is made assuming "continued normal mining operations." *U. S. Steel Mining Co.*, 6 FMSHRC 1573, 1574 (July 1984). The question of whether a particular violation is S&S must be based on the particular facts surrounding the violation. *Texasgulf, Inc.*, 10 FMSHRC 498 (April 1988). The Secretary must establish: (1) the underlying violation of the safety standard; (2) a discrete safety hazard, a measure of danger to safety, contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature. The Secretary is not required to show that it is more probable than not that an injury will result from the violation. *U.S. Steel Mining Co.*, 18 FMSHRC 862, 865 (June 1996).

I credit the evidence presented by Rinker as to the conditions that were present during training. Two miners were in the cab of the front-end loaders during task training on the top of the fines pile. This fines pile was about 400 feet wide and 7,800 feet long. It was flat and was surrounded by berms, with no drop offs. The training was conducted at slow speeds (first and second gear), with no other traffic in the area. (Tr. 220-226, 281-301; Ex. R-10). Inspector Markve based his S&S finding on the fact that the trainees loaded trucks. (Tr. 50). Mr. Reffalt testified that a trainee would only load a few trucks during his training. (Tr. 239). Mr. Kolar testified that the trainee would load a train for about 30 minutes. (Tr. 277-80; Ex. R-1). The area where this loading took place was flat, with limited traffic.

Rinker argues that when testifying about his S&S determination, Inspector Markve consistently stated that the violation was S&S because of events that could occur. Testimony that an injury "might" or "could" occur is not sufficient for an S&S finding because it does not meet the "reasonably likely" aspects of the Commission's *Mathies* test.

I find that the Secretary established that the violation was S&S. Operating the loader during training requires numerous starts and stops, changing of gears, and traveling in reverse. Mr. Kolar admitted that a trainee might turn too fast, drive too fast, panic, and hit the wrong levers. (Tr. 312-13). The loader could tip over if the trainee were to run up onto a stockpile in a panic. Fatal accidents have occurred under such circumstances. (Ex. G-6). As stated above, if the miner operating the loader were to slam on the brakes, it is reasonably likely that the passenger sitting on the armrest or in a folding chair would lose his balance or fall forward. A serious injury would be likely in such an event. Finally, it is well known that the center of

gravity of a loader changes when the bucket is raised, especially if it is full of material. In such an instance, the trainee could lose control of the loader and tip the loader over. (Tr. 253-54). The Caterpillar manuals and Rinker's safety handbook warn against operating the loader with the bucket raised. (Exs. G-8, G-9). I find that the evidence establishes that, if this practice had not been stopped, there was a reasonable likelihood that the hazard contributed to by the violation would have resulted in an injury of a reasonably serious nature.

D. Unwarrantable Failure

Unwarrantable failure is defined as aggravated conduct constituting more than ordinary negligence. *Emery Mining Corp.*, 9 FMSHRC 1997, 2004 (Dec. 1987). Unwarrantable failure is characterized by such conduct as "reckless disregard," "intentional misconduct," "indifference," or the "serious lack of reasonable care." *Id.* 2004-04; *Rochester & Pittsburgh Coal Co*., 13 FMSHRC at 193-94. A number of factors are relevant in determining whether a violation is the result of an operator's unwarrantable failure, such as the extensiveness of the violation, the length of time that the violative condition has existed, the operator's efforts to eliminate the violative condition, whether an operator has been placed on notice that greater efforts are necessary for compliance, the operator's knowledge of the existence of the violation, and whether the violation is obvious or poses a high degree of danger. *Mullins & Sons Coal Co.*, 16 FMSHRC 192, 195 (Feb. 1994); *Windsor Coal Co.*, 21 FMSHRC 997, 1000 (Sept. 1999); *Consolidation Coal Co.*, 23 FMSHRC 588, 593 (June 2001).

The Secretary argues that Bill Reffalt admitted to not only knowing about the method used to task train miners to operate loaders but also admitted to assigning the training to take place in this manner. This practice had been used at the mine for about 30 years, despite Inspector Tankersly's advice to Reffalt that this method of training was inappropriate and contrary to the safety standards. (Tr. 119-20, 235). Rinker's own safety handbook states that miners should not ride on mobile equipment "other than in the seat provided." (Ex. G-8, p.6). Further, the handbook further states, under the section on front-end loaders, "No passengers are allowed in the cab" and "[w]hen a new operator is being instructed, radio communication shall be used." *Id.* at 18. Both Reffalt and Kohler testified that they had not reviewed Rinker's task training plan for many years and they did not consult the company's safety handbook during task training. (Tr. 247, 305-06). Caterpillar manuals warn against allowing passengers in the cab. The manual for the 980H, for example, warns not to allow riders in the cab "unless the machine has an additional seat with a seat belt." (Ex. G-10 at 19).

Rinker argues that operators may conduct task training in any manner that is safe and consistent with the Secretary's safety standards. The cited standard does not prohibit the transportation of two individuals inside the cab or operator's station. The Secretary's safety standard does not mandate that everyone riding in equipment must wear a seatbelt. The only person required under her regulations to wear a seatbelt is the equipment operator. The recommendations in the Caterpillar manual and the Rinker handbook are not mandatory safety

standards. Rinker contends that it is not safe for a miner to be task trained on a loader without an experienced operator/trainer in the cab during the training.

I find that the Secretary did not establish that the violation was caused by Rinker's unwarrantable failure to comply with the safety standard. First, and most importantly, the language of the safety standard is not clear. Rinker sincerely believed that it was safer to have an experienced operator inside the cab of the loader during training. Rinker did not understand, from the language of the standard itself, that its task training methods were prohibited by the regulation. Although I determined that the regulation, when read with the preamble to the final rule, provided reasonable notice of its requirements, I find that these requirements were not clear to Rinker. Because the safety standard was poorly drafted and was not revised in the face of comments suggesting that the language was contradictory, I find that the violation in this instance was not obvious. Rinker's failure to comply with these requirements did not rise to the level of "reckless disregard," "intentional misconduct," "indifference," or the "serious lack of reasonable care."

The Secretary points to the fact that Rinker had been violating the standard for about 30 years. That point cuts both ways, however, because it can also show that Rinker did not believe that its task training methods were unlawful since they had never been called into question.

The Secretary also contends that Rinker had been put on notice that its method of task training loader operators violated the standard. Former MSHA Inspector Tankersly testified that he discussed several safety issues with Mine Superintendent Reffalt when he was at the mine investigating safety complaints during the previous year. Specifically, Tankersly testified that he told Reffalt that it was not permissible to have two people in the cab of a front-end loader for training purposes. (Tr. 119-20). Tankersly said that there could only be one person in the cab because there was only one seatbelt and one roll-over protective device. At the hearing, Bill Reffalt denied that anyone from MSHA ever advised him that it is a violation of the Secretary's safety standards to have two people in the cab of a loader during task training. (Tr. 235-36). He said that the complaint that was investigated by Tankersly involved blasting procedures. (Tr. 227-28). Reffalt testified that the discussion he had with Tankersly about front-end loaders that day concerned employees jumping on loaders and hitching a ride with the door half open. (Tr. 228). Tankersly never said that having a second person on a loader was prohibited during task training. *Id.*

Given the circumstances of the conversation between Tankersly and Reffalt, I conclude that Reffalt was not put on notice that its task training procedures violated the safety standard. I credit Reffalt's testimony that the safety complaint that Tankersly was investigating was unrelated to the training issue and that the conversation about riding in loaders was more in the nature of a passing comment. Reffalt told Tankersly that miners often forget what they are "supposed to do" and gave as an example a driller who jumped up on a loader to hitch a ride and was hanging out the door. (Tr. 228). Tankersly replied that it was a good thing that he did not see it or he would have issued a citation.

The Secretary also argues that Reffalt's own words on the day the citation was issued proves that he knew that Rinker's task training practices violated the safety standard. Inspector Markve testified that he designated the citations as an unwarrantable failure violation because, after he read the safety complaint that instigated the MSHA inspection to Reffalt, Reffalt replied:

> Well, we did it. We did it, but I don't know how else I am going to do it. I am not going to turn over a $500,000 loader to an 18-year old kid.

(Tr. 33, 52). Inspector Markve testified that he based his unwarrantable failure determination on this exchange because he believed that Reffalt's statement "meant that he knew he wasn't supposed to be doing it in the first place." (Tr. 70). Markve believes that Reffalt's statement at the closeout conference at the mine that, "[w]e won't conference it. We won't do it anymore" helps show that Reffalt knew that the task training procedure violated the safety standard. (Tr. 72). Markve testified that he took Reffalt's statements "as an admission," especially after Reffalt expressed concern that he could be terminated from his employment because of the unwarrantable failure determination. (Tr. 72-73, 92-93).

I find that Inspector Markve was reading way too much into Reffalt's statements when he based his unwarrantable failure determination on them These statements should not be construed as an admission. Instead, the statements merely indicate that Reffalt did not dispute that the company task trained miners in the manner described in the safety complaint. The fact that he said, "we won't conference it," suggests that the company would not dispute that it task trained miners in the manner described in the citation.[3] I cannot infer any admissions into Reffalt's statements.

Finally, the Secretary contends that notes from a company safety meeting held in November 2005 show that Reffalt was aware that a miner complained about the company's task training practices for front-end loaders. (Tr. 53). The Secretary maintains that this complaint put the company on notice that its task training procedures for loaders were unsafe. I cannot base an unwarrantable failure finding on this evidence because it does not directly relate to the question whether the training practices violated an MSHA safety standard. This complaint did not put Rinker on notice that greater efforts are necessary for compliance with the safety standard.

I hold that Rinker's negligence was low. I reach this conclusion because the language of the cited standard is ambiguous. In addition, the Secretary did not provide a definition of "equipment operators' stations," a key term in the standard, in a regulation or other interpretative material. It was not unreasonable for Rinker to believe that the equipment operator's station for the loader was the same thing as the cab.

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[3] Rinker ultimately did participate in a conference concerning this citation before an MSHA conference and litigation specialist.

E. Penalty Against William Reffalt

Section 110(c) of the Mine Act provides that, whenever a corporate operator violates a mandatory health or safety standard, any agent of such corporate operator who "knowingly authorized, ordered, or carried out such violation" shall be subject to a civil penalty. 30 U.S.C. § 820(c). The Commission held that "knowingly" means "knowing or having reason to know." *Kenny Richardson*, 3 FMSHRC 8, 16 (Jan 1981); *aff'd* 689 F.2d 623 (6th Cir. 1982). "A person has reason to know when he has such information as would lead a person exercising reasonable care to acquire knowledge of the fact in question or to infer its existence." *Richardson*, 3 FMSHRC at 16. "If a person in a position to protect employee safety and health fails to act on the basis of information that gives him knowledge or reason to know of the existence of a violative condition, he has acted knowingly and in a manner contrary to the remedial nature of the statute." *Id.* "In order to establish section 110(c) liability, the Secretary must prove only that the individual knowingly acted not that [he] knowingly violated the law." *BethEnergy Mines*, Inc., 14 FMSHRC 1232, 1245 (August 1992).

The Secretary argues that she is not required to show that Reffalt acted willfully in violating the safety standard but only that he had reason to know that a hazardous condition existed. She maintains that Reffalt knew of the existence of the violative practice and that he assigned Kevin Kohler to task train miners using this practice. She notes Inspector Tankersly's warning to Reffalt that this practice was not permitted by the regulations. She also relies on his "admission" to Inspector Markve that he task trained in this manner and that he believed that his job was in jeopardy. Reffalt knew about the violative practice and he did nothing to stop or correct it. Indeed, he instructed quarry employees to task train miners in a manner that violated the safety standard. Finally, a miner had identified and complained of this unsafe practice a month before the citation was issued and Reffalt did not take any steps to stop the practice.

The Secretary cites *U.S. v. Gibson*, 409 F.3d 325, 336 (6th Cir. 2005), for the proposition that "mine superintendents or foremen can be said to have knowingly authorized, ordered, or carried out violations of the [Mine Act] when they enter mines and observe violations but do nothing to stop or correct them." (S. Br. 17). In that criminal case, a mine superintendent and foreman were charged with "authorizing, ordering, and carrying out the violation of the mining regulation that requires the mine operator to adopt and follow a ventilation plan." *Id.* Apparently, ventilation curtains were down at the face and throughout the mine so that there was insufficient ventilation at the face. *Id.* at 335.

Respondents argue that the evidence does not support a finding of knowing conduct on the part of Mr. Reffalt. He understood that no miners were allowed to ride outside the cab of the loader because that practice would be unsafe and in violation of the standard. He reasonably understood that the cab and the equipment operator's station were identical in a loader and that the task training methods used were both safe and in compliance with the safety standard. He also believed that task training a miner to operate a loader using a radio was unsafe because the trainee would have to hold the radio and operate the vehicle at the same time. (Tr. 231-32). He

acknowledged that radio communication could be used for training an experienced miner who had operated loaders at other mines or facilities. Reffalt did not know that the training practices at the mine violated the Secretary's safety standards. (Tr. 226). Indeed, he himself was task trained on loaders in the same manner when he first started operating them at the quarry. (Tr. 235). This practice had been in place for at least 30 years. Reffalt's actions demonstrate that he had a safety conscious attitude. Given the language in the standard, Reffalt had no reason to know that the task training method used at the quarry was in violation of that standard.

Rinker is a corporate operator and Mr. Reffalt was an agent of the corporation. As discussed above, the corporate operator violated section 56.9200(d). I find that Reffalt did not knowingly authorize, order, or carry out the violation of section 56.9200(d). I incorporate my findings with respect to the unwarrantable failure issue. In addition, the evidence shows that Reffalt reasonably believed that the method used to task train miners to operate loaders was safe. Trainees were closely supervised in a secluded, flat area and the loader was operated at low speeds. He believed that the risk of injury was no greater than if the trainer had communicated to the trainee via radio because the inexperienced miner would have had difficulty operating the controls and maneuvering the loader while using the radio. He said that the 980H loader is new with a lot of complicated features. (Tr. 222). It is powerful, quick, and the steering wheel is very responsive. (Tr. 223). The fact that one miner complained that this practice is unsafe does not mean that Reffalt's disagreement with that complaint amounted to a knowing violation. Because the violation at issue in *Gibson* would be obvious to anyone with even a casual understanding of underground coal mining, that case is not helpful here. For the reasons stated above, I find that Reffalt believed that the task training method used on loaders at the quarry did not violate section 56.9200(d). As stated above, the regulation is not clear on its face. Reffalt reasonably believed that Rinker's task training procedures for front-end loaders, which had been used at the quarry for about 30 years, were safe.[4] Consequently, the case brought against Mr. Reffalt is dismissed.

III. APPROPRIATE CIVIL PENALTY

Section 110(i) of the Mine Act sets forth six criteria to be considered in determining appropriate civil penalties. The record shows that the Guernsey Quarry had a history of about six paid violations in the two years prior to December 20, 2005, all of which were designated as non-S&S. (Ex. G-1). The quarry worked about 47,200 hours in 2005 and employed 22 people. The

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Reffalt's admission that he had not consulted Rinker's corporate safety handbook with respect to task training on loaders is troubling. He testified that the safety handbook contains general rules because it applies to all of Rinker's operations and that the provision stating that "[w]hen a new operator is being instructed, radio communication shall be used" is designed for new employees who have previous experience operating loaders. (Tr. 255-57). He also testified that a trainer is not a "passenger" as that term is used in the handbook. (Tr. 254-55). This testimony is not very convincing. Nevertheless, I find that Reffalt genuinely believed that the task training program used at the quarry was safe and in compliance with MSHA safety standards because, in part, this program had been used for years at the quarry without incident.

citation was abated in good faith. The violation was serious and Rinker's negligence was low. The penalty assessed in this decision will not have an adverse effect on Rinker's ability to continue in business. Based on the penalty criteria, I find that a penalty of $500.00 is appropriate for this violation.

IV. ORDER

Based on the criteria in section 110(i) of the Mine Act, 30 U.S.C. § 820(i), I assess the following civil penalties:

WEST 2006-451-M (Rinker Materials Western, Inc.)

7913458	56.9200(d)	$500.00

WEST 2007-113-M (William E. Reffalt)

7913458	56.9200(d)	Penalty Vacated

For the reasons set forth above, Citation No. 7913458 is **AFFIRMED** as **MODIFIED** in this decision. Rinker Materials Western, Inc., is **ORDERED TO PAY** the Secretary of Labor the sum of $500.00 within 30 days of the date of this decision. Payment should be sent to the new address: U.S. Department of Labor, Mine Safety and Health Administration, P.O. Box 790390, St. Louis, MO 63179-0390.

For the reasons set forth above, the petition for assessment of penalty brought against William E. Reffalt in WEST 2007-113-M is **DISMISSED**.

Richard W. Manning
Administrative Law Judge

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